No. 80-1054

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID OLTERSDORF,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIRST DIVISION

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QUESTIONS PRESENTED

1. Whether *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 was correctly applied to reverse a Federal Employers' Liability Act personal injury case in which the petitioner was working in a different industry at the time of trial because of a rejected offer of proof which deducted income taxes and Railroad Retirement Act contributions from both railroad earnings and earnings as a non-railroad watchman to compute a "present value" of the net future lost earnings and which estimated the net return on the fund by reducing the discount rate from 7% to 6% and because of a slanted cautionary instruction as to income taxes.

2. Whether the Appellate Court erred in refusing to consider the justifiable reliance by the plaintiff on Illinois law and on "significant impact" cases and in refusing to permit plaintiff to brief or argue the meaning of *Liepelt*.

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REFERENCE TO REPORTS

The opinion of the Appellate Court of Illinois, First District, First Division is reported at 83 Ill. App. 3rd 457, 404 N.E. 2d 1320 (1980) and is appended hereto at pages A-1 through A-13. The order and mandate of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal appears at pages A-14 through A-15.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, First Division was entered on March 24, 1980. Petitioner's timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on September 29, 1980 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISION FOR JURISDICTION

62 Stat. 929, as amended, 28 U.S.C. § 1257(3)

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

STATUTES INVOLVED

35 Stat. 66, as amended, 45 U.S.C. § 51.

"Liability of common carriers by railroad, in interstate or foreign co. mmerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

26 U.S.C. § 104(a)(2), Int. Rev. Code of 1954 § 104(a)(2).

"Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expense) for any prior taxable year, gross income does not include — . . . (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness . . . ."

STATEMENT OF FACTS

The right leg of the petitioner, a 36 year old switchman, was partially severed because a cut of cars was switched into the cars between which he was working. His leg was amputated at the hospital. He suffered additional operations on the stump following the amputation and was permanently disqualified from railroad work. At the time of trial, he was working as a watchman. Additional facts concerning the accident are stated in the Opinion which found the railroad's negligence to be "strongly supported by the evidence" (A-8).

The facts relevant here involve the railroad's attempt to introduce evidence concerning income taxes and railroad retirement deductions from the plaintiff's future lost railroad earnings and from his projected future earnings as a watchman. Prior to trial, the railroad filed a motion *in limine* to permit such evidence (C. 131) and was met by a like motion to refuse such evidence (C. 128). After oral argument, the income tax evidence was refused by the trial court with leave to the railroad to present its offer of proof (R. 20, 21).

The petitioner presented no actuarial evidence. The railroad, however, presented such evidence as to gross earnings. The railroad's actuary testified that the plaintiff, who was 39 at the time of trial (R. 27), had an estimated railroad work life of 18.5 years. This figure was derived from an evalution of assets and liabilities under the railroad retirement act pension system (R. 397, 398). The actuary assumed that the plaintiff would retire from all work at the age of 57 and would have no further earnings. The plaintiff was not compelled to retire until the age of 68 on the defendant railroad (R. 228). His life expectancy at the time of trial was 32 years (R. 225).

The actuary further assumed a "historical" 5% annual increase in general employment earnings. The actuary had reviewed earnings in the railroad industry, but they were substantially higher than 5% (R. 401). He chose the general employment figures because they were for a longer period of time and he was talking about 18 years in his projection (R. 402). The actuary used a 7% discount rate because he looked for a safe rate of interest at which the money could be invested today (R. 399). Using those percentages, he testified that the present value of the plaintiff's earnings as a railroad conductor over the 18.5 years of "work expectancy" would create a present value of $453,721.00 (R. 403). Using the same percentages over the same period, the actuary calculated the present value of plaintiff's earnings at his then employment as a security guard would be $126,-352.00 (R. 404). [Petitioner is now unemployed because the company for which he worked as a security guard went bankrupt.] The actuary arrived at the present value of the plaintiff's net future lost earnings as $327,369 by deducting the present value of security guard earnings from the present value of railroad conductor earnings (R. 404).

After the actuary's testimony. the respondent made an offer of proof outside the presence of the jury by interrogating the actuary (R. 413-418). In that offer of proof the actuary stated that he made similar computations as to earnings, but deducted from those earnings future income taxes, Michigan State income taxes and railroad retirement taxes. In the offer, no percentages or rates were stated nor did the actuary state whether the figures used were for a single or married taxpayer. There was no testimony as to the consideration of any deductions which the plaintiff might have had as a homeowner. The actuary did recognize that the earnings on the present value of after tax earnings would also be taxable. He stated that he had

compensated for such taxation because he "subtracted income taxes from the interest rate used to discount the figures and discounted it at a 6 percent rate rather than 7 percent" (R. 416). The earnings on the fund were thus reduced at an effective tax rate of 14.28%. The actuary then stated that such calculations reduced the present value of plaintiff's lost future earnings over the same period of time from $327,369.00 down to $166,051.00 (R. 417), or a reduction of almost 50%.

The trial court correctly rejected that offer of proof, but the Appellate Court accepted it and summarized it in its Opinion. The trial court also refused the defendant's instruction which stated:

> "In reaching your verdict, you will not increase the amount of your verdict by reason of federal, state or local income taxes, since the amount awarded to plaintiff is not taxable income to plaintiff within the meaning of these tax laws."

Oral argument on appeal was heard before this Court handed down its decision in *Norfolk & Western Ry. Co.* v. *Liepelt,* 444 U.S. 490, 62 L. Ed. 2d 689, 100 S. Ct. 755 (1980). Plaintiff's counsel called the attention of the court to the *Liepelt* decision in a letter in which he requested further oral argument or further briefs. The Appellate Court rejected that request and issued its Opinion without any attempt to discover the plaintiff's position in detail. It is on the basis of that letter that the court states that plaintiff's counsel attempted to distinguish the *Liepelt* decision. It mentions the fact that counsel contended that *Liepelt* applied only to wrongful death cases, but it does not mention that this Court found in *Liepelt* that the verdict was "improperly inflated". A Petition for Rehearing was filed which was denied without requiring respondent to file an answering brief.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Petitioner asserted its position on the federal claims raised by the respondent at every level of the Illinois court system.

Prior to trial, petitioner and respondent filed Motions *In Limine,* the respondent asserting that income tax evidence should be permitted while petitioner opposed such evidence. The trial court refused to permit such evidence to be admitted, but permitted respondent to make an offer of proof of such evidence (R. 413 through 418, A-16 through A-18). The cautionary instruction was refused by the trial court (R. 432). The respondent raised the federal questions in its brief for appellant. The Illinois Supreme Court decided the federal question on the basis of this Court's Opinion in *Norfolk & Western Ry. Co.* v. *Liepelt,* 444 U.S. 490 (A-10).

Petitioner filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois which was denied on September 29, 1980. Thus, the Appellate Court of Illinois, First District, First Division is the "highest court in [the] state in which decision could be had." 28 U.S.C. § 1257.

ARGUMENT

LIEPELT DID NOT DECIDE NOR CONSIDER THE ISSUES RAISED BELOW IN A FEDERAL EMPLOYERS' LIABILITY ACT PERSONAL INJURY CASE WHERE THE PETITIONER WAS EMPLOYED IN ANOTHER INDUSTRY BECAUSE HE WAS PHYSICALLY DISQUALIFIED FROM RAILROAD EMPLOYMENT. THIS COURT SHOULD DECLARE THE APPLICATION AND LIMITATIONS OF *LIEPELT* TO SUCH CASES AND SHOULD MAKE ITS RULING PROSPECTIVE ONLY.

This Court's Opinion in *Norfolk & Western Railway Co.* v. *Liepelt,* 444 U.S. 490, 62 L. Ed. 2d 689, 100 S. Ct. 755 (1980) declared that income tax evidence and a cautionary instruction were improperly refused in a FELA wrongful death case. The instant case is a personal injury case under the same Act and, as such, it was not specifically treated in *Liepelt.* This case is further complicated because petitioner was employed as a watchman at the time of trial. (He is now unemployed because his employer became bankrupt and went out of business.) The income tax computations below were thus based on two different incomes causing the plaintiff reduced lost earnings because of the progressivity of the federal income tax. The complexity of the problems here involved requires specific treatment of those problems not reached in *Liepelt.*

Those problems certainly require more than the cavalier disregard received from the Appellate Court. For example, the Opinion states that the railroad contended the verdict was excessive (A. 1), but does not rule on that contention. Instead, it reverses the judgment because *Liepelt* reversed the same Appellate Court. The Appellate

Court may have been gun-shy because it was overturned, but its fears were a totally inadequate basis on which to base its reversal. Its acceptance of the actuary's testimony as to gross earnings and its further acceptance of his nonsensical computations of a present value of $166,000 for the loss of plaintiff's livelihood at the age of 39 deserves summary reversal from this Court.

This Court specifically assumed that evidence was presented of "future inflation", but no such evidence was permitted below because of Illinois law. In that assumption, the Court follows *II Harper & James, The Law of Torts,* § 25.11 at 1323-1326 which it relied upon for admitting evidence as to income tax. The court below not only made no allowance for future inflation, it allowed for "future deflation" when it accepted the actuary's estimate of annual future wage increases of 5% in a time of double digit inflation.

The unrealistic nature of this 5% wage increase projection is further shown by comparison with the wage increases from the time of the plaintiff's injury in 1974 until the time of trial in 1978. During that period of time, the wages for plaintiff's job were increased by 40%. The gross earnings of that job in 1978 would have been $29,000. Thus, the $166,000 present value of future earnings would be slightly more than 5 times plaintiff's railroad earnings in 1978. The court also ignored his wage loss up to the time of trial of $71,000.

Petitioner attempted to point out that his case is almost entirely composed of intangible items of damage, unlike *Liepelt* which contained only one such item. Here, the jury was instructed that they could award damages for the following intangibles: 1) the nature, extent and duration of his injury, 2) his disability, 3) his resulting disfigurement,

4) his past pain and suffering and 5) his future pain and suffering. Only the loss of future earnings and future medical costs were required to be reduced to present value. No estimate was made as to the present value of future medical costs. Thus, by far the greater percentage of the 1 million dollar verdict consisted of intangible damages. By ignoring those elements, the court reversed the judgment below.

Unfortunately, the *Oltersdorf* Opinion has been relied upon by other courts in cases tried before this Court's Opinion in *Liepelt*. The judgment in a FELA personal injury case of $234,000 was reversed because of a failure to give a cautionary instruction in *Cazad* v. *Chesapeake & Ohio Ry. Co.*, 4th Cir., 622 F. 2d 72 (1980). A verdict of $75,000 in a personal injury FELA case was reversed by the Supreme Court of Alabama because of the failure to give a cautionary instruction in *Seaboard Coast Line R. Co.* v. *Yow*, 384 So. 2d 13 (1980). The Fifth District of the Appellate Court of Illinois reversed a personal injury FELA judgment of $315,000 because of the refusal of the cautionary instruction relying on this Court's *Liepelt* decision. It adhered to its view on rehearing, stating that retroactive application was required because this Court did not say that *Liepelt* was to be applied prospectively only. *Crabtree* v. *St. Louis-San Francisco Ry. Co.*, 88 Ill. App. 3rd 351, 411 N.E. 2d 19 (1980).

The only two FELA cases which specifically decided the question of the prospective application of the *Liepelt* decision were *Ingle* v. *Illinois Central RR Co.*, Mo. App., 603 S.W. 2d 32 (1980) and *Lang* v. *Texas & Pacific Ry. Co.*, 5th Cir., 624 F. 2d 1275 (1980). *Ingle* decided that the Opinion should be applied prospectively, finding specifically that the damages were not excessive, but were clearly reasonable in the case before it. On the other hand, *Lang* found in a

wrongful death case that it must apply the *Liepelt* decision unless that application would result in "manifest injustice". It then specifically found that a retrial would not amount to a manifest injustice under the facts of that case.

Both appellate courts rely upon this Court's Opinion in *Chevron Oil* v. *Huson,* 404 U.S. 97 (1971) as establishing the standards for deciding prospective application. Both analyze the three criteria set out in *Chevron Oil. Lang* decides the question on the basis of a lack of "manifest injustice". That test is not contained in *Chevron Oil,* rather this Court refers to "substantial inequitable results".

In any event, petitioner submits that *Ingle* is far better reasoned and that *Lang* is shortsighted in seeing no injustice imposed upon a widow who had a verdict reduced by over one-third by a remittitur ordered by the District Court and who relied upon the law as it existed at the time of trial. While it may be true that the widow may settle or obtain a verdict at the retrial; it is equally true that the money she receives will be of substantially less value because of inflation and because of the many years that the widow waited because of the Appellate process and the remand for a retrial.

Indeed, there is no assurance that the defendant may not appeal after the retrial causing still further delay. At the very least, a retrial almost necessarily causes "substantial inequitable results". The *Ingle* court decided each of the three tests in a reasoned exposition taking particular note of the fact that cases mentioned in *Liepelt* by this Court required the income tax instruction only prospectively.

Ingle involved a personal injury claim by a 45 year old plaintiff. The Missouri court, however, did not rely on the difference between such a case and a wrongful death case. It cogently stated that since the damages were reasonable,

not excessive and were amply supported by the evidence, the retroactive application of *Liepelt* would serve no useful purpose.

Here also, retroactive application would serve no useful purpose. The Appellate Court found the trial to be error free with the exception of the refusal of the incompetent income tax evidence and of the slanted instruction. The trial court properly relied upon the settled law in Illinois that such income tax aspects were not to be given to the jury. The trial court also relied upon the settled law in Illinois which requires that an offer of proof contain competent probative evidence before acceptance. *Simon* v. *Plotkin,* 50 Ill. App. 3d 603, 365 N.E. 2d 1022, 1025 (1977), where Justice, now United States District Judge, Bua stated:

> "An offer of proof is necessary to preserve a question for review where, as here, the trial court refuses to allow the testimony of a witness as to a certain matter or at all. (Citations omitted). An offer of proof must be made in a proper manner, and show what the offered proof is, or what the expected testimony will be, by whom or how it was made, and what its purpose is. (Citations omitted). After carefully scrutinizing the record before us we note the absence of a proper offer of proof as hereinbefore outlined. When plaintiff's testimony was refused, the record evinces that counsel merely made a general statement of his desire to elicit testimony from the witness, without the requisite specificity of a proper offer of proof. Therefore, we hold that the question of plaintiff's competency to testify was not properly preserved for review and has been waived."

The slanted instruction was likewise objectionable. The Appellate Court, however, refused plaintiff an opportunity to brief or argue such points before it reversed the otherwise error free judgment. In doing so, it impliedly assumed

that plaintiff's counsel was a fool because it nowhere considered the fact that counsel knew that this Court had previously granted *certiorari* (R. 8-19) in *Chicago, Rock Island & Pacific RR Co.* v. *Rediker* (1977), 1 Kan. App. 2d 581, 571 P. 2d 70, *cert. granted,* 435 U.S. 922, *cert. dismissed,* 435 U.S. 982, even though the Appellate Court mentions that fact in its Opinion. It also ignored the fact that *Boxberger* v. *Burlington Northern,* 9th Cir., 529 F. 2d 284 (1976) was argued at length in the trial court. During that argument, railroad counsel relied only upon the *Boxberger* "significant impact" test which he stated occurred when annual income exceeded $20,000 (R. 19, 20). Not by coincidence, this happened to be the earnings of the plaintiff in the year in which he was injured.

Plaintiff, as part of his trial strategy, was entitled to rely upon the fact that defendant had not satisfied the "significant impact test" of *Boxberger* and *McWeeney* v. *N.Y. & N.Y. RR Co.,* 2nd Cir., 282 F. 2d 34 (1960). Indeed, counsel was astounded when *Liepelt* completely abandoned that test and announced a test which permits income tax evidence except in certain undefined *de minimis* situations in its footnote No. 7. This announcement of a completely new rule of law in and of itself fulfills the *Chevron Oil Company* test.

Plaintiff relied upon the fact that the cautionary instruction was improperly drafted as compared to the suggested instruction contained in *Boxberger* v. *Burlington Northern,* 9th Cir., 529 F. 2d 284 (1976) in footnote No. 17 at page 298. Counsel also relied upon the fact that the language in *Boxberger* and prior cases dealing with the cautionary instruction required it only prospectively. There is no indication in the prior case law that the refusal of the cautionary instruction would constitute prejudicial error. The ret-

roactive application by the Appellate Court demolished the reasonable expectations of the plaintiff and in a purely reflex action mindlessly reversed the judgment solely because of its extrapolation of *Norfolk & Western Railway Co.* v. *Liepelt*, 444 U.S. 490, 62 L. Ed. 2d 689, 100 S. Ct. 755 (1980).

This Court's Opinion specifically applies to the delineation of the "pecuniary benefits" of beneficiaries in a wrongful death action arising under the FELA. This Court nowhere treats the different issues arising in a personal injury case. To the contrary, the Court states in its 10th footnote that netting out the taxes that the decedent would have paid does not confer a benefit on the tort-feasor any more than netting out the decedent's personal expenditures. In a personal injury case, of course, there is no netting out of personal expenditures. The present status of the law requires speculation and conjecture on the part of any judge or lawyer who attempts to decide whether the decision applies in FELA personal injury cases or in other wrongful death or personal injury cases.

The 5th Circuit has decided in *Croce* v. *Bromley Corp.*, 623 F. 2d 1084 (1980) that *Liepelt* does not apply to state wrongful death actions. It also decides that it may not apply in certain FELA wrongful death cases stating at 623 F. 2d 1097:

> "Moreover, the jury in *Liepelt* awarded the plaintiffs $775,000, far in excess of the estimation of the plaintiffs' pecuniary loss ($302,000) made by their own expert witness. The Court, noting this discrepancy, opined: "It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore *it improperly inflated the recovery.*" *Id.* 100 S. Ct. at 759 (emphasis added). At the trial below on the issue of damages, there was no

> inflation of the recovery beyond the amounts testified to by the expert witnesses. We thus have no reason to suppose, as the Court in *Liepelt* did, that the jury labored under the misconception that federal taxes would be imposed."

The need for clarification of *Liepelt* is strikingly demonstrated in *Nesmith* v. *Texaco, Inc.*, D.C., W.D. La. 491 F. Supp. 561 (1980). In that case, Senior District Judge Putnam applied *Liepelt* to a personal injury action which occurred while the plaintiff was being transferred in a personnel basket from a vessel to an oil drilling platform off the Louisiana coast. The question of liability having been decided, the District Judge required briefs on the *quantum* of damages.

The rule in the 5th Circuit as to damages had been announced in *Johnson* v. *Penrod Drilling Co.*, 510 F. 2d 234 (1975), *cert. den.* 423 U.S. 839. That case is mentioned in *Liepelt* as an example of the general rule in the federal courts that income taxes are not to be treated as a personal expenditure. The case, however, not only refused income tax evidence as speculative, but also refused to permit evidence as to inflationary raises. As the District Court succinctly put it at page 563:

> "The teachings of *Johnson* are premised upon the proposition that future taxes, inflationary cost of living pay raises, and fluctuating interest rates are too speculative to provide a firm foundation for fixing a reasonable and fair present value for a future loss accruing over a protracted period of time."

The Court also notes that the action was brought under the Jones Act which incorporates the FELA.

The District Court then quotes from *Liepelt* and applies that case to the facts before it. It estimates the future lost earnings which it discounts at 8% per year and applies a

growth factor of 6% per year resulting in a net discount rate of 2% over 31 years. It then arrives at a present value of some $600,000 from which it deducts 15% income tax and then gives credit for wages at the minimum wage rate over the same period at the same discount rate.

Because of its interpretation of *Liepelt* as reversing the holding of *Johnson* not only as to income taxes but also as to inflation and the other factors which *Johnson* had barred, the amount awarded applying *Liepelt* exceeds the amount that would have awarded had the *Johnson* test been applied by over $100,000.

Nesmith is directly applicable to the facts in our case because, as we have pointed out above, no evidence of inflation was presented to the jury in compliance with Illinois law. *Raines* v. *New York Central RR,* 51 Ill. 2d 428, 283 N.E. 2d 230 (1972). Thus, plaintiff was not permitted to prove future inflationary trends. Using the *Nesmith* test, judgment may be inadequate rather than excessive rendering the Appellate Court's holding even less defensible. Nevertheless, plaintiff seeks an affirmance of the judgment of the Circuit Court and a reversal of the Appellate Court because the reversal stripped him of the interest which had accumulated since judgment was entered on the verdict. Neither Illinois nor *Nesmith* assesses pre-judgment interest.

Because of the foregoing, plaintiff submits that the reversal and remandment by the Appellate Court was without reason or understanding. The refusal to permit the plaintiff the opportunity to file a Brief or to orally argue the meaning and application of this Court's Opinion is contrary to the essence of the appellate process and of due process. It summarily denied plaintiff's petition for rehearing without even requiring the railroad to answer the plaintiff's

contentions. Its statement that it ". . . must apply the teaching of the United States Supreme Court in *Liepelt* to the case before us" (A. 10) assumes the result and begs the question. The irrational decision below is part of the continuing controversey and litigation in both state and federal courts resulting in conflicting interpretations of this Court's Opinion. The federal issue involved in this case has been finally decided by the high state court which would take the case. In order to clarify the law, this Court should grant the Petition for a Writ of *Certiorari* and should reverse the Appellate Court either summarily or after Briefing and oral argument.

CONCLUSION

For the reasons adverted to above, it is respectfully submitted that this Court should grant the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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December, 1980

DAVID OLTERSDORF, Plaintiff-Appellee, v. CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant-Appellant.	APPEAL from the Circuit Court of Cook County; the Honorable LAWRENCE P. HICKEY, Judge, presiding.

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

David Oltersdorf (plaintiff) brought this action under the Federal Employers' Liability Act, for injuries in the course of duty, against Chesapeake & Ohio Railroad Company (defendant). A jury awarded plaintiff $1 million. Defendant appeals.

In this court, defendant contends the trial court erred in refusing to give defendant's requested special interrogatories relating to the plaintiff's contributory negligence; in refusing to allow evidence of the impact of taxation on plaintiff's projected future lost earnings; in refusing to instruct the jury its award of damages was not subject to taxation; and, finally, the verdict is excessive.

On September 16, 1974, plaintiff was working as a member of a 4-man crew employed by the defendant. Their assignment was to switch freight cars in and out of industrial plants at the "Kelsey-Hayes" switching area near Romulus, Michigan.

Kelsey-Hayes is a 6-track switching area. The two main tracks there are called the northbound main and the southbound main. At the south end of Kelsey-Hayes, the four other tracks diverge to the west from the main tracks and

run adjacent to the main tracks through the switching area. Moving east to west, the third track is known as the "new lead". It is used only for switching cars. The "new lead" ends at the north end of Kelsey-Hayes where it merges into the main tracks. The fourth and fifth tracks are called the "Kelsey lead" and the "environ lead", respectively. These tracks service the Kelsey-Hayes and Eaton Chemical industrial plants located northwest of the switching area. The sixth, westernmost track, is called the "Barrett lead". It services the Buffalo Tank industrial plant, also located northwest of the switching area.

At 10 p.m. on September 16, 1974, the 4-man crew, including plaintiff, reported to work at defendant's railroad yard in Wayne, Michigan. Plaintiff was a brakeman, or "fieldman". Paul Laisure was the engineer. Lewis Burghardt was conductor and Alfred Long was the headman.

Burghardt was in charge of the switching operations and of all the movements of the train and crew. Plaintiff described the conductor as the "foreman" of the crew. Laisure operated the engine. Long, the headman, was responsible for relaying signals between the engineer and the rest of the crew and for hooking the engine on and off various cars during switching operations. As fieldman, plaintiff's duties were to ride in the caboose with the conductor. When the crew was conducting switching operations, plaintiff would be stationed on the ground at the rear of the train. He would assist in the switching of cars and operating the hand brakes on cars which were unhooked or "cut" from the train.

Plaintiff testified the crew left the Wayne, Michigan railroad yard with an engine, 17 boxcars and a caboose. Plaintiff was riding in the caboose with Burghardt. The train stopped at the Romulus, Michigan depot. Plaintiff

picked up switching orders assembled by one of defendant's agents from directions given to him by the three plants serviced from Kelsey-Hayes. Plaintiff gave Burghardt the orders, gave a copy of them to Long and kept a copy for himself. The train left Romulus on the southbound main track heading for Kelsey-Hayes. Plaintiff's best recollection was he rode in the caboose with Burghardt and Long rode in the engine with the engineer. Burghardt carried a "walkie-talkie" and there was a radio in the engine. There was no communication between the caboose and the engine during the 5 minute ride from Romulus to Kelsey-Hayes.

Plaintiff stated he discussed the switching work to be done with Burghardt on the way to Kelsey-Hayes. Burghardt told plaintiff he planned to release or "cut" the engine from the remainder of the train and leave the 17 boxcars and the caboose on the southbound main track. Burghardt would then take the engine to the new lead track, the next track to the west. There, he would connect 9 cars to the engine. The 9 cars were already standing on the new lead as part of a longer train. From front to rear these cars were 4 boxcars, 2 tank cars, 2 more boxcars and a flatcar. Burghardt told plaintiff they would then pull out the 9 cars, put the flatcar on the Barrett lead, the farthest track to the west, put the next 2 boxcars back on the new lead, and then put 2 tank cars on the Barrett lead. The 4 boxcars left on the train would be connected to the remaining cars on the new lead and then "doubled up" with the boxcars remaining on the southbound main track which the crew had brought from Wayne. All these cars would then be taken to the Kelsey lead, west of the new lead, and pushed into the Kelsey-Hayes plant.

When the train arrived at Kelsey-Hayes, the engine was detached from the 17 boxcars and caboose. They were left

standing on the southbound main as Burghardt had said. Burghardt alighted from the caboose and uncoupled 9 cars on the new lead from the other cars there. The engine was then brought to the new lead and attached to these 9 cars which Burghardt had just "cut". Plaintiff testified that at this point, Long, the headman, asked Burghardt "what he had in mind". Burghardt repeated to Long, as Burghardt had previously told plaintiff in the caboose, about these 9 cars. The crew was to take the flatcar to the Barrett lead, the 2 boxcars back to the new lead, the 2 tank cars to the Barrett lead, and then they would double up the remaining cars with the 17 boxcars which remained on the southbound main track, all to be taken to the Kelsey lead.

Plaintiff's testimony as to what happened up to this point was contradicted by Burghardt and Long. These witnesses testified that on the trip from Romulus to Kelsey-Hayes, plaintiff was not in the caboose with Burghardt but was riding in the engine with Long, the headman, and the engineer. Plaintiff's counsel virtually conceded this fact in his closing argument. Both witnesses also testified that while plaintiff received the switching list at Romulus, he did not give it to Burghardt until the train arrived at Kelsey-Hayes. Burghardt testified he did not communicate by radio with anyone in the engine during the trip from Romulus. However, Long stated plaintiff did converse with Burghardt on the radio. Plaintiff told Burghardt he had received the switching list "and went over a few things on the list." Long could not recall any more of the conversation.

Burghardt testified that after he reviewed the switching list, he told plaintiff and Long they would take the first 9 cars off of the train on the new lead, put the flatcar into the Barrett lead, put the 2 box cars and 2 tank cars back

into the new lead, and then take the remaining 4 boxcars and connect them to the 17 cars they had brought from Wayne. Burghardt specifically denied he ever told plaintiff he was going to put the 2 tank cars on the Barrett lead. Burghardt stated his intention was to put another flatcar (which he claimed was on the train they brought from Wayne) on the Barrett lead. He testified putting the tank cars on the Barrett lead would be "totally contrary" to his method of switching. This would require him to handle the tank cars at least one more time to get them out from between the flatcars and on to the Kelsey lead where they would be pushed into the Eaton Chemical plant.

Long testified he could only remember Burghardt telling plaintiff and himself that the flatcar at the rear of the 9 cars on the new lead had to go to the Barrett lead.

Events which transpired after the conversation between plaintiff, Burghardt and Long at Kelsey-Hayes are basically undisputed. After the engine was coupled to the cut of 9 cars on the new lead, it pulled these cars 1,000 yards south on the new lead past the switch regulating entry into each track. The switch was then thrown so that the engine could "kick" the flatcar on the north, rear end of the train into the Barrett lead, to the extreme west, as planned. The "kick" is a maneuver by which the engine begins to push the cars and the coupler pin is pulled to disconnect the cars from the engine. The engine is then stopped and the released cars continue to roll ahead on their own momentum.

The flatcar was kicked. Plaintiff boarded it and set the hand brake as the car rolled into the Barrett lead. Plaintiff then lined up the coupling mechanism on the flatcar so the next car to enter the track would couple with the flatcar.

After the flatcar was released, the engine went south past the switch once more. Burghardt reset the switch for

the train to enter the new lead. As Burghardt was standing by the switch, he told Long, "I want two boxcars and two tank cars." Long stood at the rear of the train. He testified he interpreted Burghardt's directions as meaning he wanted two separate cuts of 2 cars each. He did not know where Burghardt intended to put the tank cars. Long uncoupled the last 2 boxcars from the 2 tank cars and the 2 boxcars were kicked into the new lead. When Burghardt saw only the 2 boxcars entering the new lead, he told Long, "Let the tank cars go, too." Long accordingly uncoupled the 2 tank cars and they were also kicked into the new lead. According to Burghardt, the time between these two kicks was 5 to 15 seconds. Burghardt did not know where plaintiff was at this time.

Meanwhile, plaintiff had left the flatcar standing on the Barrett lead and was walking toward the new lead track. As he walked, he could see the silhouettes of Long and Burghardt and he also saw the 2 boxcars coming into the new lead. When plaintiff arrived at the new lead, he pulled the coupling pin on the southernmost stationary car which the boxcars were about to connect with. He did this to insure a clean connection. The boxcars coupled with the standing cars and plaintiff stepped across the rail to connect the air hoses between the coupled cars. Plaintiff testified he could hear the engine "revving" to kick the 2 tank cars but he thought they were being kicked into the Barrett lead. As plaintiff started to step out from between the boxcars, the 2 oncoming tank cars made contact and coupled onto the boxcars. The resulting jolt caused plaintiff to fall between the boxcars. Plaintiff's right leg was partially severed below the knee by the wheel of one of the cars.

Neither Burghardt nor Long realized what happened until plaintiff asked for them to come over and help him. A

tourniquet was applied to plaintiff's leg. At the hospital his leg was amputated just below the knee.

Plaintiff, Burghardt and Long further testified as to the customs and practices involved in switching operations. Burghardt testified it was not the usual custom and practice to lace or connect air hoses between cars while cars were in the process of being switched. Usually, the hoses on a cut of cars would be connected after the engine was attached to the cut and the cars were stretched out. However, plaintiff stated it was never his custom to wait until the engine was attached to the train to connect the air hoses. Long corroborated the plaintiff's testimony. Long stated plaintiff performed a usual and customary act in lacing the air hoses as he did. Long noted that since those cars were going to be switched out, they were required to have air supply.

Plaintiff testified the usual custom and practice when a conductor wanted to switch 4 cars onto one track would be for him to ask for 4 cars and not to request 2 and 2 as Burghardt had done on the night of the accident. Plaintiff and Long had never heard Burghardt ask for a cut of 4 cars in that manner before the night of the accident. Burghardt stated he intended to put the 4 cars on the new lead but he admitted that his manner of asking may have been confusing to plaintiff and Long.

Safety rules were introduced into evidence by both parties. Plaintiff introduced a rule from defendant's own book of safety rules. The rule states:

> "*Planning work.* To expedite switching the conductor or yard foreman will see that all members of the crew, including the engineer, when practical, are fully informed of the switching movement to be made as many moves in advance as possible thereby giving them an opportunity to be prepared for such movement.

> "After other members of the crew have been informed of the sequence of switching movements to be made, changes should not be made unless those concerned have been fully informed of the changed conditions."

When asked if Burghardt had complied with this rule, Long answered, "Well, no."

Defendant introduced a safety rule applicable to switching operations from the "Chessie System Operating Rules" which states:

> "They [switchmen] must expect movement of trains, engines or cars at any time on any track in either direction."

Predicated upon these facts, it is our opinion the verdict as regards the negligence of defendant is strongly supported by the evidence. This portion of the verdict is approved.

An actuarial expert called by defendant testified as to plaintiff's projected lost future earnings. The actuary calculated that, assuming a 5 percent annual increase in wages, an 18.5 year future work life and a 7 percent discount rate, the then present value of plaintiff's lost future earnings, after deducting the amount he would make in his present job as a security guard, was $327,369. This amount did not take into consideration any deductions for income taxes. Prior to this testimony, the trial court had granted plaintiff's motion *in limine* to exclude any evidence on the impact of taxation on lost future earnings. Defendant offered to prove that if Federal income taxes, state income taxes and railroad retirement taxes were considered in the calculations and the discount rate was lowered to 6 percent, the net lost future earnings would be $166,051. As already noted, the jury returned a verdict of $1 million.

The trial court also refused a defendant's instruction which stated:

> "In reaching your verdict, you will not increase the amount of your verdict by reason of federal, state or local income taxes, since the amount awarded to plaintiff is not taxable income to plaintiff within the meaning of these tax laws."

Since oral argument before this court on January 12, 1980, we have had the benefit of a decision by the Supreme Court of the United States in *Norfolk and Western Ry. Co.* v. *Liepelt* (Docket No. 78-1323, filed February 19, 1980), —— U.S. —— , —— L. Ed. 2d —— , —— S. Ct. —— . *Liepelt* originated in the circuit court of Cook County. This court affirmed on appeal. (*Liepelt* v. *Norfolk and Western Ry. Co.* (1978), 62 Ill. App. 3d 653, 378 N.E. 2d 1232, *leave to appeal denied,* 71 Ill. 2d 618). *Liepelt* involved a wrongful death action under the Federal Employers' Liability Act (FELA). At trial, actuarial evidence was heard as to the lost future earnings of the decedent, which were calculated to be $302,000. The trial court there also refused to allow evidence of the impact of taxation on the lost earnings. In an offer of proof by defendant, an actuary calculated that the net amount of lost earnings, after consideration of the impact of Federal income taxes and making adjustments to the annual increase in wages and the discount rate, was $138,327. The trial court also refused to instruct the jury that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." *Liepelt,* (Docket No. 78-1323, filed February 19, 1980), —— U.S. —— .

At the time this court reviewed *Liepelt,* the United States Supreme Court had not decided these issues. Therefore, we followed the decisions of the Illinois Supreme Court thereon and affirmed the trial court. (See *Liepelt,* 62 Ill. App. 3d

653, 668-69). However, the United States Supreme Court reversed our decision and held that "the wage earner's income tax is a relevant factor in calculating the monetary loss suffered***" and "it was error to refuse the requested instruction in this case." The Supreme Court remanded the cause for further proceedings.

Plaintiff's counsel has attempted to distinguish *Liepelt* from the instant case. He contends *Liepelt* deals only with wrongful death actions under the FELA in which damages are limited to decedent's contributions to the surviving dependents. We find no merit to this contention and conclude the *Liepelt* decision controls this case.

There is no language in the opinion of the United States Supreme Court to indicate it is limited to wrongful death cases under the FELA. Furthermore, the Court had previously granted certiorari on precisely these same issues on instructions in a personal injury action under the FELA where, as in the instant case, the plaintiff suffered the loss of a leg. *Chicago, Rock Island & Pacific R.R. Co.* v. *Rediker* (1977), 1 Kan. App. 2d 581, 571 P. 2d 70, *cert. granted,* 435 U.S. 922, *cert. dismissed,* 435 U.S. 982 (pursuant to Supreme Court Rule 60).

Therefore, we must apply the teaching of the United States Supreme Court in *Liepelt* to the case before us. We hold the trial court erred in refusing to allow evidence of the impact of taxation on plaintiff's lost future earnings and in refusing to instruct the jury its award of damages was not subject to taxation.

Under the view we take of the instant case, it is also necessary for us to pass upon the propriety of defendant's special interrogatories relating to plaintiff's contributory negligence which were refused by the trial court.

Under the FELA, "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee***." 45 U.S.C. §53 (1977).

In our opinion, the contradictory nature of the testimony in the instant case raised an issue of fact as to whether plaintiff exercised ordinary care for his own safety before and at the time of the occurrence. We conclude the issue of plaintiff's contributory negligence was properly left for the jury to resolve.

Defendant tendered two special interrogatories pertaining to the contributory negligence issue. They were:

"*SPECIAL INTERROGATORY NO. 1.*

"Do you find that the plaintiff was guilty of contributory negligence which was a proximate cause of his injury?

"Yes _____

"No _____

"*SPECIAL INTERROGATORY NO. 2.*

"If you have answered the preceding question 'Yes', what portion or percentage of the plaintiff's negligence contributed to his injury?

"_____"

The trial court rejected these special interrogatories on the theory they did not control the verdict. Defendant contends this was reversible error. It has long been the rule that "[t]he court is not required to submit a special interrogatory unless it relates to ultimate facts of such a character that it would control a general verdict." (*Springfield Coal Mining Co.* v. *Gedutis* (1907), 227 Ill. 9, 13, 81 N.E. 9; *Stephenson* v. *Air Products & Chemicals, Inc.*

(1969), 114 Ill. App. 2d 124, 137, 252 N.E. 2d 366, *leave to appeal denied,* 42 Ill. 2d 585). Therefore, interrogatories of this type should necessarily be framed "for the purpose of controlling any general verdict that may be returned for the plaintiff." *Chicago & Alton R.R. Co.* v. *Harrington* (1901), 192 Ill. 9, 34, 61 N.E. 622.

Defendant argues the above special interrogatories would have been controlling on the ultimate issue of damages. We disagree. In the instant case, the jury was properly instructed as to how damages should be computed in event of contributory negligence (Illinois Pattern Jury Instruction, Civil No. 160.13 (2d ed. 1971) (hereinafter cited as IPI Civil)):

> "If you find that plaintiff's injury was proximately caused by a combination of plaintiff's contributory negligence and negligence on the part of the defendant, then in assessing the damages you should proceed in the following manner: First, determine the amount of the plaintiff's damages without reference to the question of contributory negligence. Second, decide what proportion or percentage of the total combined negligence of both parties causing the injury consisted of the plaintiff's negligence. Finally, reduce by this proportion or percentage the amount of damages you would have awarded had the plaintiff's negligence not contributed to the injury."

If these two special interrogatories had been given there would be no possibility of ascertaining whether the above instruction was followed. The only fact that could be deduced from the answers to these interrogatories is the degree or percentage of plaintiff's contributory negligence, if any. We could not be aware of the amount of damages without reference to the question of contributory negligence. Without knowledge of the jury's thinking on this

point, the special interrogatories could not control "any general verdict that may have been returned for the plaintiff."

In addition, the defendant's first special interrogatory is improper in form. It fails to limit the inquiry of whether plaintiff was guilty of contributory negligence to "before and at the time of the occurrence." (*Stephenson,* 114 Ill. App. 2d 124, 137, citing IPI Civil No. 10.03.) Thus, the trial court properly refused to submit these interrogatories to the jury. See *Skinner* v. *Baker* (1978), 67 Ill. App. 3d 773, 786, 384 N.E. 2d 1360, *leave to appeal denied,* 75 Ill. 2d 594.

For these reasons, the judgment appealed from is reversed and the cause is remanded for a new trial on the issue of damages only. In fixing the amount of plaintiff's damages, the jury will be required to determine if plaintiff was guilty of contributory negligence; and, if so, what proportion or percentage of the total combined negligence of both parties consisted of the plaintiff's contributory negligence.

Reversed and remanded with directions.

McGLOON and O'CONNOR, JR., JJ., concur.

UNITED STATES OF AMERICA

STATE OF ILLINOIS ss.
SUPREME COURT

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the eighth day of September, in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE
JUSTICE ROBERT C. UNDERWOOD
JUSTICE HOWARD C. RYAN
JUSTICE THOMAS J. MORAN
JUSTICE DANIEL P. WARD
JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS E. KLUCZYNSKI
TYRONE C. FAHNER, ATTORNEY GENERAL
LOUIE F. DEAN, MARSHALL
ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 29th day of September, 1980, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

DAVID OLTERSDORF, *Petitioner* No. 53478 *vs.* CHESAPEAKE & OHIO RAILROAD COMPANY, *Respondent*	Petition for Leave to Appeal from Appellate Court First District 78-1828

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 23rd day of October, 1980.

(SEAL)

/s/ CLELL L. WOODS,
Clerk,

Supreme Court of the State of Illinois.

EXCERPTS FROM THE TRIAL RECORD

MR. DOMASH: Let the record show that this is an offer of proof being made in chambers with regard to the question of using net figures as opposed to gross and the question of impact of inflation as previously raised by the parties to this lawsuit to which trial briefs were filed and certain Court rulings were made.

Mr.Sherfey, there was mention made to you of the railroad increase rate of 8.7 percent over the past 9-year period.

If that were used in the future, how much of that 8.7 percent would be inflation as opposed to true growth and productivity?

THE WITNESS: The historic figures I used indicating 5 percent annual increase are generally thought of to be 2 percent increase in productivity and 3 percent inflation. That fluctuates somewhat from year to year, but over a long period of time those are the figures.

In recent years, we have had higher inflation than in prior years, and then the entire increase is due to inflation.

So, an 8.7 total would be about 6.7 inflation and 2 percent for increases in productivity.

MR. DOMASH: So, you would be projecting continuing inflation for 18.5 years?

THE WITNESS: Yes.

MR. DOMASH: Now, at my instance and request did you make similar calculations taking into account the impact of income taxes?

MR. DOMASH: Federal income taxes?

THE WITNESS: We considered Federal income taxes, Michigan State and Railroad Retirement taxes.

MR. DOMASH: Can you tell us generally then what the impact of income taxes would be on this individual's earnings?

THE WITNESS: Well, yes.

If you are trying to measure his net loss, the true loss is really the difference between his take-home pay from his railroad job and his take-home pay in the alternate occupation.

MR. DOMASH: All right.

THE WITNESS: That is, the basic measure of that is to subtract the taxes that he would have to pay out of his income.

MR. DOMASH: First of all, would the taxes that you have mentioned have a significant impact on the figures?

THE WITNESS: Yes, they do.

MR. DOMASH: Why is that?

THE WITNESS: Because we pay a lot of taxes.

MR. DOMASH: Does it depend on the bracket or level of income that the individual is in?

THE WITNESS: Well, your Federal income taxes are progressive and the higher the income the greater effect, greater proportionate effect it will have.

MR. DOMASH: Well, rather than doing that now, you used the same formula, the same mathematics, that you testified to previously except you calculated it for net income rather than gross, is that correct?

THE WITNESS: One other change. We subtracted out the taxes and then we also felt that since the investment income earned on the money invested today would be subject to income taxes, we also subtracted income taxes from the interest rate used to discount the figures and discounted it at a 6 percent interest rate rather than 7 percent.

MR. DOMASH: In other words, since the money would be earning interest you have to pay income tax on the interest?

THE WITNESS: Yes.

MR. DOMASH: You then lowered your discount rate—

THE WITNESS: Yes.

MR. DOMASH: (Continuing) — to 6 percent, and

other than that you used the formula that you previously testified to other than the changes you have just mentioned?

THE WITNESS: Yes.

MR. DOMASH: With regard to railroad earnings subtracting security guard earnings, what would the net loss of future earnings be?

THE WITNESS: The present value of a railroad conductor would be $268,408. The present value of security guard earnings would be $102,357, for a net loss of $166,051.

MR. DOMASH: In other words, the net, if you were calculating a net take-home pay, it would be $268,408 as a switchman as opposed to $453,721 as a switchman?

THE WITNESS: I understand that was both for conductors.

MR. DOMASH: For conductors. I am sorry.

THE WITNESS: These are the correct figures, yes.

MR. DOMASH: Okay. And similarly as a security guard it would be $102,357 as opposed to $126,352?

THE WITNESS: Correct.

MR. DOMASH: All right. You did not make the calculations with regard to working as a yard master yet?

THE WITNESS: No, I did not.

MR. DOMASH: We will have that calculated later if necessary, whatever that figure might be.

That is all I have.

MR. HARRINGTON: I object. The objection stands. We have argued it previously.

THE COURT: Yes.

Thank you, sir.

(Whereupon the further hearing of the above-entitled matter was recessed until 2:00 o'clock p.m., this same date.)